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Ms. Jaco will rely upon her Jurisdictional Statement provided in Appellant's Brief.

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STATEMENT OF FACTS

Ms. Jaco will rely upon her Statement of Facts provided in Appellant's Brief.

ARGUMENT

I. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT REFUSED TO ADMIT INTO EVIDENCE DEFENDANT'S EXHIBIT J, WHICH WAS THE ONLY PHOTOGRAPH TENDERED BY EITHER THE STATE OR MS. JACO DEMONSTRATING THE SOLE EYE-WITNESS' VANTAGE POINT, WITH THIS EVIDENTIARY EXCLUSION PREMISED UPON THE CHANGE IN APARTMENT FURNISHINGS/FURNITURE DEPICTED IN EXHIBIT J FROM THOSE EXISTING AT THE TIME ZACHARY BROOKS' INJURIES WERE SUSTAINED BECAUSE ANY DIFFERENCE IN FURNISHINGS/FURNITURE DEALS SOLELY WITH THE WEIGHT OF THE EVIDENCE AND NOT THE ADMISSIBILITY OF THE PHOTOGRAPH IN THAT SAID EXCLUSION BY THE TRIAL COURT DESTROYED DEFENDANT'S RIGHTS BESTOWED UPON HER BY THE FIFTH AMENDMENT AND FOURTEENTH AMENDMENT DUE PROCESS CLAUSES AND/OR THE SIXTH AMENDMENT CONFRONTATION CLAUSE OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 AND ARTICLE I, SECTION 18(a) OF THE MISSOURI CONSTITUTION BY COMPLETELY PRECLUDING DEFENDANT'S RIGHT TO CONFRONT HER ACCUSER AND PRESENT FAVORABLE EVIDENCE DEMONSTRATING THAT IT WAS IMPOSSIBLE FOR MR. ECKHOFF TO MAKE THE CLAIMED OBSERVATION THAT DEFENDANT COMMITTED THE ACT CHARGED AND THEREFORE THIS EXCLUSION OF EVIDENCE

RESULTED IN CONSTITUTIONAL ERROR AND/OR WAS AN ABUSE OF DISCRETION.

The first issue that Ms. Jaco presented to this Court was whether the trial court committed prejudicial, reversible error when it refused to admit Defendant's Exhibit J, which was the only photograph depicting the sole eye-witness' true line of sight. (App. A1). Because no photograph was taken by the State that actually showed the witness' line of sight and his inability/ability to make the claimed observation, Ms. Jaco took various photographs of the apartment, which included Exhibit J. (App. A1) (Vol. IV 692:6-11). When Exhibit J was offered into evidence the trial court refused its admission into evidence and presentation to the jury solely because the furnishings in the apartment had changed. (Tr. Vol. IV 690:14-20). However, the floor plan remained consistent in all photographs. (Tr. Vol. IV 688:11-25; 689:1-25; 690:1-25; 691:1-12).

Standard of Review

Ms. Jaco will rely upon the Standard of Review as stated in Appellant's Brief. However, she must reiterate that "[w]here a case stands or falls on the jury's belief or disbelief of essentially one witness, that witness' credibility or motive must be subject to close scrutiny." State v. Joiner, 823 S.W.2d 50, 55 (Mo. Ct. App. 1991) *quoting* State v. Hedrick, 797 S.W.2d 823, 827 (Mo. Ct. App. 1990) *quoting* State v. Roberts, 611 P.2d 1297, 1300-01 (1980).

Background

The events leading up to the claimed incident and the positioning of Mr. Eckhoff, Ms. Jaco and Zachary in the apartment are the critical aspects of this issue. Mr. Eckhoff stated that

at the time the shaking purportedly occurred, Mr. Eckhoff was leaning against the kitchen sink and next to the refrigerator. (Tr. Vol. II 387:21-24; Vol. II 388:1; Vol. II 389:1). Mr. Eckhoff then states that Christy, while standing between the couch and the coffee table near the middle of that same table in the general area of her tennis shoes, (L.F. 108) (Tr. Vol. II 393:7-25: 394:1-2; Vol. II 395:25), picks Zachary up off of the couch from her left side. (Tr. Vol. II 391:24-25). Mr. Eckhoff claims that Christy then held Zachary, with arms extended at shoulder height, and shook him back and forth. (Vol. II 395:9-14). Mr. Eckhoff further indicated that when this shaking occurred Christy was facing the bedroom and therefore the outstretched arms would be extended away from the window and towards the bedroom and he viewed Christy's right side. (Vol. II 395:3; Vol. II 401:16).

Prior to trial, Ms. Jaco, her counsel and Mr. Robert Thomure, an investigator, contacted the new tenant of the apartment in question. (Tr. Vol. IV 692:6-11). This tenant granted access to the apartment for the purpose of taking photographs, measurements and video of the apartment layout. (Tr. Vol. IV 692:6-11). Ms. Jaco's offer of Exhibit J was denied by the trial court during trial based upon the fact that the furnishings were different from those present at the time Mr. Eckhoff and Christy resided there. (Tr. Vol. IV 690:14-20). There was no argument presented by either Christy or the State that the floor plan or physical layout of the apartment was different in either the State's photographs or the proposed photographs and there was no argument that the wall shown in Exhibit J, which proves that Mr. Eckhoff could not have made his claimed observation, was somehow changed or moved. (Tr. Vol. IV 688:11-25; 689:1-25; 690:1-25; 691:1-12).

During deliberations, the jury requested the apartment photographs for their review in determining Ms. Jaco's innocence or guilt; the photographs given to the jury during deliberations did not include Exhibit J. (L.F. 170) (Tr. Vol. IV 861:21-25; 862:1-6).

Response and Reply

It was and remains Ms. Jaco's contention that any change in furnishings depicted in the photograph simply involved the weight the evidence should receive and any change in furniture should not be used by the trial court ruling that the photograph was inadmissible.

Respondent claims that no error occurred by excluding Exhibit J because the photograph was confusing and misleading. In fact, Respondent claims that the confusion results "because it appears to have been taken from the middle of the living room and it is difficult to determine from the photograph where appellant was standing ... in that the furniture that was used by Eckhoff to describe where appellant was standing is not shown." (Resp. Br. Pg. 18).

1. Change in furniture/furnishings goes to weight not admissibility.

First, in response to Respondent's claim that the photograph was misleading because the same furniture at the time of the incident was not shown, Ms. Jaco again brings this Court's attention to State v. Kinder, 496 S.W.2d 335, 339 (Mo. Ct. App. 1973). The Kinder Court clearly stated that any change in furniture "would go only to the weight to be given to the exhibits, not to their admissibility." Id. Thus, any change in furniture does not preclude the admission of a tendered exhibit and does not make the exhibit confusing or misleading. 2. Exhibit J was taken, relying upon Mr. Eckhoff's testimony, from Ms. Jaco's location

facing Mr. Eckhoff's location while the State's photographs were taken from the opposite side of the coffee table and towards the middle of the living room.

Next, in response to the claim that Exhibit J was taken from the middle of the living room, Ms. Jaco brings this Court's attention to Defendant's Exhibit H, which are the State's photographs. (A2). The top photograph purports to be a view from the living room to the kitchen and at the photograph's bottom left a portion of a blue plastic box is shown. (A2). Once again, in the bottom photograph the same blue plastic box is depicted on the coffee table. (A2). Further, in the top photograph on Appendix page three the same blue plastic box is again shown and is prominently displayed resting on the right corner of the coffee table closest to the kitchen. (A3). The blue plastic box depicted in these three (3) photographs clearly show that these photographs, which were taken by the State, were taken near the middle of the living room and on the opposite side of the coffee table from where Mr. Eckhoff claimed Ms. Jaco was located.

It is a matter of common sense when comparing lines of sight to the kitchen as demonstrated in the tendered Exhibit J (A1) and the line-of-sight demonstrated in Exhibit H (A2) that Exhibit J was, in fact, not taken from the middle of the living room as in Exhibit H one may clearly see into the kitchen and in Exhibit J one may not see clearly into the kitchen. Exhibit J, contrary to Respondent's claim, was taken at the area where Mr. Eckhoff claimed Ms. Jaco was located and not from the opposite side of the coffee table as the State's photographs depict.

Further, State's Exhibit 21, which was offered by Respondent during this appeal, was

taken from an area where Mr. Eckhoff claimed he was not located. State's Exhibit 21 appears to have been taken from in front of the kitchen refrigerator. (A2 and Exhibit 21). Thus, Exhibit 21 was taken from an area that was approximately three (3) to four (4) feet closer to the wall than where Mr. Eckhoff claims to have been located. Nonetheless, although it is not a clear representation of Mr. Eckhoff's line-of-sight, it is clear from Exhibit 21 that his line-of-sight was precluded and impaired. After receiving the State's photographs at the trial level, including Exhibit 21, Ms. Jaco visited the apartment and took additional photographs, including Exhibit J, in an effort to show the actual line-of-sight from the precise location where Mr. Eckhoff claimed she was located.

Ms. Jaco agrees with Respondent's assertion that evidence should be excluded if the prejudicial effect outweighs the aid provided to the jury. However, Exhibit J would have no prejudicial effect and would have provided the greatest amount of aid to the jury and therefore should have been admitted; Exhibit J proves that it was impossible for Mr. Eckhoff to make his claimed observation. (A1).

Respondent makes citation to State v. Wright, 632 S.W.2d 296 (Mo. Ct. App. 1982) in support of its position. However, Wright is inapplicable to the case at bar because it involved a posed picture and not a crime scene photograph. Id. at 299. In that case, the photograph involved someone other than the defendant reenacting the crime and standing in an area to explain the cause of the witness' misidentification of the defendant. Id. The Court stated that the posed photograph's prejudice outweighs any benefit it may provide to the jury. Id. In so doing, the Court recognized that "[t]his type of photograph, as opposed to mere crime scene

pictures, should be subjected to even greater scrutiny." Id.

Next, Respondent makes citation to State v. Craig, 406 S.W.2d 618 (Mo. 1966), to support its argument. However, and once again, Craig is inapplicable to the case at bar because Exhibit J was taken from the precise location where Mr. Eckhoff claims Ms. Jaco was standing and was facing the area where Mr. Eckhoff claimed he was located. In Craig, the trial court excluded a photograph offered by the defendant because the photograph was taken during the daytime while the crime occurred at night, which resulted in a dramatic difference in lighting. Id. at 624. Further, the photograph was taken from the outside porch and therefore it was taken from a completely different area than where the witness claimed she was located at the time her observations were made. Id. The photograph was only held inadmissible because it demonstrates a line-of-sight that was inconsistent with the witness' line-of-sight at the time the observation was made. Id.

Thus, neither Wright or Craig are controlling or determinative of the issue before this Court. Exhibit J, unlike Wright, did not involve a posed photograph reenacting the crime in an effort to explain an error in the witness' identification but rather was a crime scene photograph. Further, Exhibit J, and unlike Craig, was taken from the precise location where the State's only eye-witness claimed Ms. Jaco was located and was taken in the direction where Mr. Eckhoff was standing when he made his claimed observation. In this case the trial court's ruling was that the photograph was inadmissible because the furnishings were different; the ruling was not based upon the fact that the line-of-sight was inconsistent with Mr. Eckhoff's testimony where Ms. Jaco was located and/or where Mr. Eckhoff was located. (Tr. Vol. IV

690:14-20)[1].

In Appellant's Brief, Ms. Jaco cited numerous cases wherein the Courts have consistently held that any change in conditions depicted in a photograph only goes to the weight the evidence receives and does not effect its admissibility. Ms. Jaco desires simply to refer and incorporate herein her prior arguments in that regard.

Next, Respondent states that "Appellant also failed to show that the Defense Exhibit J had any relevance because she did not make an offer of proof showing that it portrayed Eckhoff's line of sight." (Resp. Br. Pg. 19). At trial, Ms. Jaco made the appropriate offer of proof, which was in part that "we would have an investigator by the name of Thomure who would indicate his qualifications as a former police officer and investigator of crime scenes, who would state that he had taken certain measurements and lines of sight from the areas that we would then tie up with respect to the testimony of Mr. Eckhoff." (Tr. Vol. IV 692:6-11). In fact, during the bench conference Ms. Jaco requested to recall Mr. Eckhoff in order to introduce the photograph and the trial court stated that it would not allow the admission of the photograph through Mr. Eckhoff's testimony. (Tr. Vol. IV 691:2-12). Thus, Respondent's claim that the offer of proof was deficient is without merit.

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[1] The trial court stated that "Well, I just don't see how you can introduce this as being a fair and accurate representation of how it appeared at the relevant times when you take this as much later as this picture you're telling me has been taken. The different furnishings and everything throws everything out of, basically our of kilter from the way it really was. It's misleading.

Respondent also makes citation to State v. Uka, 25 S.W.3d 624 (Mo. Ct. App. 2000). However, the Court's holding in Uka is equally inapplicable to this case. In Uka, the defendant was convicted of harassment and unlawful use of a weapon, but the appeal from the guilty finding for unlawful use of a weapon was dismissed because the defendant received a suspended imposition of sentence for that charge. Id. at 626. The facts supporting defendant's harassment conviction were that the defendant continuously threatened to kill the victim after she moved out of his home. Id. At trial, the defendant tendered a photograph depicting the victim at the time she lived with the defendant showing her "in good health and well-nourished" in order to contradict her claim that she received maltreatment while living in the defendant's home. Id. at 627.

However, although the photograph was ruled inadmissible, the defendant in Uka was permitted to introduce the testimony of another witness stating that the "victim appeared happy and healthy while living with defendant." Id. Thus, because the impeachment evidence was presented to the jury the Court held that "in light of the impeaching testimony of the defense witness, we cannot say that failure of the trial court to admit the photographs for impeachment purposes was an abuse of discretion. Moreover, any error by the trial court in not admitting the photographs was harmless and not prejudicial as similar impeaching testimony was before the jury."

Uka is not applicable to the case at bar because there was no photograph or other evidence that accurately demonstrated Mr. Eckhoff's actual line-of-sight.[2] As stated above,

[2] Ms. Jaco does submit that the photograph in Uka was also likely irrelevant in that

the photographs taken by the State and offered into evidence were taken from areas different from where Mr. Eckhoff claimed he was located and from areas different from where Mr. Eckhoff claimed Ms. Jaco was located. Exhibit J corrected this deficiency and therefore was not cumulative evidence in this case but rather was a critical piece of evidence in defending against Mr. Eckhoff's claims.

Respondent does correctly point out that Ms. Jaco did address Mr. Eckhoff's inability to make the claimed observation during closing argument. (Resp. Br. Pg. 20). However, without having Exhibit J available, the closing argument was that of an inference, which is the same form of inference that violated Ms. Jaco's Constitutional rights as stated in Davis v. Alaska. 415 U.S. 308, 317 (1974) (reversing defendant's conviction and finding violation of the Confrontation Clause when the trial court refused to admit evidence of the witness' criminal history during cross-examination because the defendant should not have been placed in the unfortunate position of appearing to propose speculative questions and the jury was entitled to have "the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided 'a crucial link in the proof'").

Thus, in light of the foregoing, Ms. Jaco's conviction must be set aside and this matter

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the charged crime occurred well after the victim moved out of the defendant's home and the photograph involved defendant's physical condition while living at the home. Thus, the photograph in that case did not involve a critical issue while Exhibit J in this case does involve a critical issue.

remanded for a new trial so that the jury may receive all of the evidence and so that Ms. Jaco may enjoy the full constitutional benefits bestowed upon her by the United States and Missouri Constitution, including, but not limited to, her right to due process, a fair trial, and the confrontation clause.

II. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT REFUSED MS. JACO'S REQUEST TO CROSS-EXAMINE TWO (2) EXPERT WITNESSES ABOUT THEIR RESPECTIVE FAMILIARITY WITH SCIENTIFIC STUDIES INVOLVING SHAKEN BABY SYNDROME BECAUSE ANY SCIENTIFIC STUDY THAT IS GENERALLY ACCEPTED IN THE SCIENTIFIC COMMUNITY IS PROPER USE IN CROSS-EXAMINING EXPERT WITNESSES AND MAY BE ALSO RECEIVED AS PROPER PROFILE EVIDENCE IN THAT THE TRIAL COURT'S REFUSAL TO ALLOW THESE CROSS-EXAMINATIONS AND PRESENTATION OF EVIDENCE VIOLATED THE DEFENDANT'S RIGHTS BESTOWED UPON HER BY THE FIFTH AMENDMENT AND FOURTEENTH AMENDMENT DUE PROCESS CLAUSES AND/OR THE SIXTH AMENDMENT CONFRONTATION CLAUSE OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 AND ARTICLE I, SECTION 18(a) OF THE MISSOURI CONSTITUTION.

Ms. Jaco also presented to this Court the issue of whether the trial court committed reversible error when it refused her the right to cross-examine two (2) of the State's expert witnesses about their respective familiarity with scientific studies that were generally accepted in the scientific community and/or to introduce the results of those same studies into evidence. Ms. Jaco believes that this evidence should have been received by the trial court and presented to the jury and the trial court's refusal resulted in prejudicial reversible error.

Standard of Review

Ms. Jaco will rely upon the Standard of Review provided in Appellant's Brief. She does, however, desire to state that "[w]here a case stands or falls on the jury's belief or disbelief of essentially one witness, that witness' credibility or motive must be subject to close scrutiny." State v. Joiner, 823 S.W.2d 50, 55 (Mo. Ct. App. 1991) *quoting* State v. Hedrick, 797 S.W.2d 823, 827 (Mo. Ct. App. 1990) *quoting* State v. Roberts, 611 P.2d 1297, 1300-01 (1980).

Statistical Studies

As stated in Appellant's Brief, Ms. Jaco desired to cross-examine Dr. Martin Keller and Dr. Jane Turner about shaken baby statistical studies, which Dr. Turner acknowledged as reliable and accepted in her field, that included the following scientific conclusions:

a. That children living in households with one or more male adults not related to them are at risk for maltreatment, injury or death. Moreover, that these same children were subjected to abuse or even death as a result of shaking or blunt trauma.

b. That these studies establish that children living in households with adult men unrelated to them are eight (8) times more likely to die of abuse then children living with one or both biological parents.

c. That most perpetrators of shaking and/or blunt trauma to children are unrelated males.

d. That a risk factor for infant children being abused is where the child is living with a step-father or the mother's boyfriend.

e. That scientific studies established that a common accidental injury explanation/defense offered by perpetrators is that the baby was in some form of distress, choking or not breathing and the perpetrator mildly shook the baby in a vain effort to revive the baby.

(L.F. 164-167; 230-232).

It was undisputed that Mr. Matthew Eckhoff was unrelated to Zachary Brooks, the infant victim. (Tr. Vol. III 619:4; 619:12-13; 637:3-10). It was equally undisputed that Mr. Eckhoff resided with Zachary Brooks. (Tr. Vol. II 325:11). Lastly, it was undisputed that Mr. Eckhoff's first several statements made to the investigating officers claimed that Zachary was in some form of distress, that he then shook Zachary for several moments, Mr. Eckhoff then placed Zachary on the floor where his head made a popping sound when it made contact with the floor and that Mr. Eckhoff claims to take other steps in which to revive Zachary. (Tr. Vol. II 349:25; Vol. II 350:7-10; Vol. II 438:10-16; Vol. II 439:1-5; Vol. II 440:6-23; Vol. II 350:22-23; Vol. II 442:3-5; Vol. II 351:21-15).

Response and Reply

Prior to trial, Ms. Jaco filed a Motion in Limine concerning this issue, which was denied by the trial court. (L.F. 164-167) (Tr. Vol. I 7:6-12; Vol. I 191:18-25; Vol. I 192:1-11; Vol. I 237:2-25; Vol. I 238:1-25; Vol. II 239:1-12). This Motion in Limine was renewed and an offer of proof was timely made during the cross-examination of Dr. Martin Keller and Dr. Jane Turner. (Tr. Vol. I 7:6-12; Vol. I 191:18-25; Vol. I 192:1-11; Vol. I 237:2-25; Vol. I 238:1-25; Vol. II 239:1-12). Once again, Ms. Jaco's requests to cross-examine and/or present

this scientific evidence was denied. (Tr. Vol. I 7:6-12; Vol. I 191:18-25; Vol. I 192:1-11; Vol. I 237:2-25; Vol. I 238:1-25; Vol. II 239:1-12).

Respondent first claims that this type of expert testimony is inadmissible and makes citation to Minnesota v. Nystrom, 596 N.W.2d 256, 260 (Minn. 1999), contending that community crime statistics were inadmissible because they were not relevant to prove that the defendant acted in self-defense when he shot the victim. However, the Nystrom Court did not hold that this type of testimony is automatically inadmissible but stated that this type of testimony would be admissible if the defendant were aware of the crime statistics. Id. Ultimately, the Court held that this type of testimony was not relevant in the case to support self-defense because the evidence presented did not satisfy the foundational elements of self-defense. Id. In fact, the Court recognized that the evidence before the trial court was that (1) the defendant did have the ability to retreat by his actual leaving the scene and then returning and (2) the absence of aggression where the defendant was the initial aggressor. Id.

Respondent's citation to Hudson v. Florida, 820 So.2d 1070 (Fla.5th DCA 2002), is misplaced because in that case the pedofile reference was objectionable and improper when it was directed at the defendant specifically. The proffered expert testimony in Ms. Jaco's case did not reference any particular person but rather discussed the scientific studies involving shaken-baby syndrome.

Next, Respondent raises the holding in Johnson v. Delaware, 813 A.2d 161, 165-166 (Del. 2001), for the proposition that drug courier profile evidence is not admissible as substantive evidence on the issue of guilt. However, as in Hudson, the profile evidence was

arguably improper[3] because during closing argument the State argued that the controlled substance must be the defendant's because of the evidentiary similarities present in the case when comparing the drug courier profile. Once again, in Ms. Jaco's case this evidence would not be directed at any particular individual, let alone the defendant, as substantive evidence of guilt.

Respondent also raises People v. Castaneda, 64 Cal.Rptr.2d 395, 398 (Cal.App.4th 1997), for the proposition that admission of heroin dealer profile testimony as substantive evidence on the issue of guilt is error. In that case the defendant was charged with possession of heroin, a user, and not possession of heroin with intent to distribute, a dealer. The officer's heroin dealer profile was that the typical heroin dealer was usually a Hispanic adult male. The rationale employed by the Court in reversing the defendant's conviction was that this testimony was prejudicial because the "inappropriate and dangerous implication of this evidence was: Do not let this man free; he may have done more than possess heroin – he may be a heroin dealer." Id. The conviction was set aside because this prejudicial inference resulted in the defendant not being tried on evidence involving the specific crime charged but rather the Court believed the defendant was tried "on general facts accumulated by law enforcement regarding a particular criminal profile." Id.

It does appear, however, that Respondent admits that this type of testimony is admissible where it explains and describes behavioral characteristics observed in victims.

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[3] The Court ultimately held that it was not plain error to admit this testimony and that the trial counsel's failure to object to this evidence was the result of strategy.

(Resp. Br. Pg. 24). Further, it appears that the parties are in agreement that this type of evidence is admissible to explain unusual behavior and/or unusual injuries. (Resp. Br. Pg. 24). In this regard, as Ms. Jaco has consistently argued, this type of testimony should have been admitted at trial. In her Motion in Limine she raised the issue of maltreatment and abuse. In her offer of proof she again raised the issue of maltreatment and abuse.

It is clear from Respondent's Statement of Facts, although not set forth in its argument, that the evidence included a history of bruising following Ms. Jaco's living with Mr. Eckhoff.[4] The evidence also included the fact that Zachary, after residing with Mr. Eckhoff, no longer seemed to be the happy baby he once was. (Tr. Vol. III 650:17-18). Moreover, the evidence included the fact that Zachary, although normally outgoing with all people, would shy away from Mr. Eckhoff. (Tr. Vol. III 652:18-25; 653:1-13).

Respondent's assertion that this type of testimony is inadmissible "because it pertains to whether appellant was the person who committed the offense, rather than to the nature of the victim's injuries or conduct" is misplaced and incorrect. First, nothing in the proposed testimony states that Ms. Jaco did or did not commit the offense charged. Rather, the proposed testimony explains the shaken-baby syndrome profile and describes the totality of the circumstances in arriving at the truth. See State v. Sager, 600 S.W.2d 541, 573 (Mo. Ct.

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[4] Ms. Jaco recognizes that there is a claim made by Respondent that there was unusual bruising prior to her residing with Mr. Eckhoff, but it was clear from the respective grandmother's testimony that the unusual bruising only began after she moved-in with Mr. Eckhoff. (Tr. Vol. III 627:2-14; 646:19-23).

App. 1980) (holding that scientific evidence should not be excluded if the purpose is to offer to the jury the totality of the circumstances in arriving at the truth).

As such, in light of the foregoing, Ms. Jaco submits that her conviction must be set aside and this matter remanded for a new trial.

III. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT DENIED DEFENDANT'S MOTION TO DECLARE SECTION 557.036 OF THE MISSOURI STATUTES FACIALLY UNCONSTITUTIONAL AND PROCEEDING WITH A BIFURCATED TRIAL BECAUSE THE STATUTE PROVIDES NO PROCEDURAL SAFEGUARDS TO A DEFENDANT DURING THE PENALTY PHASE OF A BIFURCATED TRIAL INCLUDING, BUT NOT LIMITED TO, (A) DOES NOT IDENTIFY THE STANDARD OF PROOF THAT A JURY MUST EMPLOY IN REVIEWING EVIDENCE IN AGGRAVATION DURING THE PENALTY PHASE, (B) THE STATUTE DOES NOT REQUIRE THAT THE STATE PROVIDE NOTICE TO A DEFENDANT OF EVIDENCE IN AGGRAVATION THAT IT INTENDS TO PRESENT DURING THE PENALTY PHASE AND DOES NOT REQUIRE THAT THE STATE PROVIDE NOTICE TO A DEFENDANT OF THE WITNESSES THAT WILL TESTIFY DURING THE PENALTY PHASE, (C) THE STATUTE PERMITS THE INTRODUCTION OF CHARACTER EVIDENCE DESPITE THE FACT THAT THE DEFENDANT HAS NOT INJECTED THE ISSUE OF CHARACTER AT TRIAL, AND (D) THE MISSOURI LEGISLATURE ENCROACHED UPON AN AREA RESERVED TO THE JUDICIAL BRANCH AND DIRECTLY AFFECTED THE RIGHT TO A JURY TRIAL, AND IN ENACTING THIS TYPE OF PROCEDURE AND THE PROCEDURE EMPLOYED BY THE COURT IN BIFURCATING THE TRIAL INTO A GUILT PHASE AND PENALTY PHASE VIOLATED THE PROCEDURAL

PROTECTIONS GUARANTEED TO DEFENDANT BY THE FIFTH AMENDMENT, SIXTH AMENDMENT, EIGHTH AMENDMENT AND FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND/OR ARTICLE I, SECTION 10, ARTICLE I, SECTION 21, AND THE CONSTITUTIONAL SEPARATION OF POWERS PROVIDED IN ARTICLE II, SECTION 1, AND ARTICLE V, SECTION 5 OF THE MISSOURI CONSTITUTION.

The next issue that Ms. Jaco presented to this Court was whether the trial court committed reversible error when it denied Defendant's Motion to Declare Section 557.036 Unconstitutional and thereby proceeded with a bifurcated trial in accord with the provisions of that same statute. The grounds relied upon in Ms. Jaco's Motion included the fact that the Statute provided no procedural safeguard to a defendant because no guidance was given to the jury as to the specific level of proof and burden of persuasion that must be satisfied in examining evidence in aggravation. Additionally, the Statute provided no procedural safeguard to a defendant because it does not require the State to provide prior notice of (1) a list of aggravating or mitigating circumstances; (2) a list of the witnesses that may testify during the second phase, and (3) documents that the State intended to introduce during the second phase. The Statute also provides no procedural safeguard when it allows the introduction of the defendant's "history and character," without defining the limits of same and even when the defendant has not injected the issue of character. Lastly, the amended procedure directly effected Ms. Jaco's constitutional right to a jury trial and due process when the legislature

violated the separation of powers doctrine.

Ms. Jaco continues in her position that the provisions of Section 557.036 are constitutionally infirm and therefore the trial, both the guilt phase and penalty phase, must be reversed.

Response and Reply

1. Section 557.036 is facially unconstitutional and, as argued by Ms. Jaco in her brief, it unconstitutionality deprived her of her statutory right to a jury sentence recommendation that would serve as the statutory maximum sentence.

Respondent first argues that Ms. Jaco may not address the constitutionality of Section 557.036 because her claim of facial unconstitutionality was made in an attempt to avoid demonstrating prejudice. (Resp. Br. Pg. 29). This is simply not the case. Ms. Jaco went to trial and this new procedure was used; Ms. Jaco was subjected to the flaws contained in this Statute and therefore Ms. Jaco has standing to complain. Her complaint is not about how it may effect other criminal defendants but rather her complaint is about how the Statute effected her trial and her rights during that trial.

Ms. Jaco, in her point relied on, clearly stated that Section 557.036 violated several constitutional rights. Also, it is uncontested that the jury in Ms. Jaco's case was not provided any guidance as to the level of proof that it must employ in reviewing evidence during the penalty phase. It is further uncontested that Ms. Jaco was entitled to a jury sentence recommendation that would serve as the maximum sentence that the trial court may then impose, which could have been the minimum sentence of ten (10) years in the Missouri

Department of Corrections. It is further uncontested that the sentence Ms. Jaco did, in fact, receive was twenty (20) years in the Department of Corrections, which is considerably more than the minimum sentence that the jury could have recommended if they would have received the proper guidance.

Ms. Jaco agrees that State v. Mahan, 971 S.W.2d 307, 311 (Mo. 1998), requires that a defendant must challenge the sentence as it is applied to him or her to possess the requisite standing to complain on appeal. Ms. Jaco did make the necessary complaint before the trial began; she then made the necessary complaint during the trial; she made the complaint in her Motion for New Trial; and again makes this complaint on appeal to this Court. The issue is preserved and in light of the procedure employed at Ms. Jaco's trial and the result thereto she does possess the requisite standing, an additional ten (10) years of standing behind the Department of Corrections' walls, in which to raise the unconstitutionality of Section 557.036.

2. The reasonable doubt standard of proof in proving evidence in aggravation of punishment is required during the penalty phase.

Next Respondent contends that the reasonable doubt standard of proof is not required during the penalty phase. Although, it does appear that Respondent admits that this standard of proof is required where the evidence in question is the functional equivalent of an element of the offense. Ms. Jaco fully briefed this issue and explained the importance the jury recommended sentence plays in a criminal trial; it is the true statutory maximum sentence that a trial court may impose.

Ms. Jaco, by citation to Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), explained that "[o]ther than the fact of a prior conviction, any fact that **increases** the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (emphasis added). Thus, any fact that the jury considers in increasing its recommended sentence, which is then the prescribed statutory maximum, must be proved beyond a reasonable doubt. Further, Ms. Jaco brought to this Court's attention that Justice Scalia's concurring opinion explained that elements of a crime "includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment)." Id. at 501.

Ms. Jaco believes that she fully briefed this issue in Appellant's Brief and will not belabor the Court with reciting her entire argument herein.

However, since the time that Appellant's Brief was filed with this Court, the United States Supreme Court decided Blakely v. Washington, 124 S.Ct. 2531 (June 24, 2004), and she desires to discuss that holding. In Blakely, the defendant pled guilty to kidnaping his wife. Id. at 2534-2535. The maximum sentence associated with that charge is up to ten (10) years in prison. Id. 2535. Further, the State of Washington adopted a Sentencing Reform Act that provided a standard range of punishment of 49 to 53 months for this charge. Id. The Sentencing Reform Act also authorized a trial court to depart from the standard range of punishment if an aggravating fact is found justifying an exceptional sentence. Id. The trial court, not a jury, found the existence of an aggravating fact and imposed a 90 month sentence. Id.

The United States Supreme Court reversed the sentence imposed because the Sixth Amendment required that the finding of this aggravating fact must either be admitted by the Defendant or found by a jury beyond a reasonable doubt. Id. at 2543. In so doing, the Blakely Court squarely rejected the contention that there was no constitutional violation because the sentence imposed, which was 90 months, was less than the statutory maximum provided for this class of crime, which was 120 months. Id. at 2537. The Court stated that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment.'" Id. (emphasis in original).

The Blakely Court also discussed the Sixth Amendment's role in both indeterminate sentencing schemes and determinate sentencing schemes when it stated the following:

> First, the Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. Indeterminate sentencing does not do so. It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty. Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems

> important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence – and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned.

Id. at 2540. (emphasis in original).

The Court ultimately concluded that "every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." Id. at 2543. (emphasis in original). Therefore, because this sentencing procedure "did not comply with the Sixth Amendment" the resulting sentence was invalid. Id. at 2538. See also United States v. Lucca, 377 F.3d 927, 934 (8th Cir. 2004) (holding that Blakely not offended where the defendant received a sentence determined by the trial court of 120 months, which was the mandatory minimum term of imprisonment and therefore no additional findings were required in order to justify that sentence).

It does appear that the Missouri sentencing scheme may be classified as a hybrid-indeterminate sentencing scheme. Specifically, Ms. Jaco has a right to request a jury sentence recommendation which serves as the maximum sentence that a trial court may impose, while the trial court possesses discretion in affixing the sentence within the statutory minimum range and that recommended by the jury.[5]

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[5] Ms. Jaco acknowledges that if the jury cannot agree on an appropriate sentence that the trial court may then impose a sentence. However, Ms. Jaco does state that she has a

It cannot be contested that Ms. Jaco enjoys the protections afforded by the Sixth Amendment and the Fourteenth Amendment of the United States Constitution. Further, it cannot be disputed that Ms. Jaco possessed the right to a jury recommended sentence in this case. It also cannot be disputed that Ms. Jaco possessed the right to have the jury's recommended sentence serve as the statutory maximum in the range of punishment. For example, Ms. Jaco submits that if the jury recommended ten (10) years imprisonment and the trial court imposed a sentence of twenty (20) years, the imposed twenty (20) year sentence would be invalid under the Sixth Amendment.

Thus, in accord with the Sixth Amendment and the United States Supreme Court decisions in Apprendi, Ring v. Arizona, 536 U.S. 584 (2002), and Blakely, the evidence in aggravation of punishment permitted in Section 557.036 must be submitted to the jury and found beyond a reasonable doubt. The jury was not so instructed in this case rendering the sentencing procedure, as in Blakely, in conflict with the Sixth Amendment and therefore Ms. Jaco's sentence is invalid.

3. Notice of Penalty Phase Evidence and Character Evidence

Ms. Jaco will simply rely upon her arguments provided in Appellant's Brief as and for the issues of Notice of Penalty Phase Evidence and Charter Evidence.

4. The Missouri Legislature violated the Separation of Powers Clause set for in the Missouri Constitution

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right to a fair opportunity to receive a jury sentence recommendation, which she did not receive in this case because of the Statute's errors and flaws.

Respondent claims that Ms. Jaco "incorrectly argues that the legislature could not make this procedural change because this Court had already issued rules pertaining to trials that did not address this issue of 'second stage proceedings,' other than in death-penalty cases." (Resp. Br. Pg. 36). Ms. Jaco refers this Court to Appellant's Brief wherein it was stated that "Missouri Supreme Court Rule 27.02 governs and regulates the order of a felony jury trial, and does not include any 'second stage proceedings' other than those in death penalty cases." (App. Br. Pg. 107-108) (emphasis added). In other words, Rule 27.02 does not permit or provide for any form of second stage proceedings other than in death penalty cases.

Further, Missouri Supreme Court Rule 29.02, which was referenced in Appellant's Brief, dispels and contradicts Respondent's assertion that "this Court did not address the issue in its rules." (Resp. Br. Pg. 36). Rule 29.02 (a) provides "[i]n all cases of a verdict of conviction for any offense where by law there is an alternative or discretion as to the kind or extent of punishment to be imposed, the jury may assess and declare the punishment in their verdict except as otherwise provided by law." V.A.M.R., 29.02 (1980). In other words, the kind or extent of punishment to be imposed must be declared in the verdict of conviction. See State v. Casey, 338 S.W.2d 888, 891 (Mo. 1960) (stating that the term "verdict" in Rule 27.18 (now Rule 29.02) "is the definitive answer given by the jury to the court concerning the matters of fact committed to the jury for their deliberation and determination").

Thus, the Missouri Legislature violated the Separation of Powers Clause when it enacted Section 557.036, which is a change in criminal procedure although already regulated

by Missouri Supreme Court "Rules of Criminal Procedure" .[6]

[6] Ms. Jaco calls this Court's attention to Respondent's Brief wherein Respondent admits that Section 557.036 resulted in a change in criminal procedure. (Resp. Br. Pg. 27) (Resp. Br. Pg. 38).

CONCLUSION

In light of the foregoing and the arguments set forth in Appellant's Brief, Ms. Jaco again requests the relief stated in Appellant's Brief including, but not limited to, the setting aside of her conviction and remanding this cause for a new trial.

SIGNATURE BLOCK

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 1st day of September, 2004, two true and correct copies of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to the Office of Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

The undersigned further hereby certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06, and the brief contains 7,742 words.

The undersigned also hereby certifies that the labeled disk, simultaneously filed with the hard copies of the brief, was scanned for viruses and is virus free.

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